United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 74-1651

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P/S

In the

United States Court of Appeals

For the Second Circuit

RETIRED PERSONS PHARMACY, t/a NRTA—AARP PHARMACY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

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INTEREST OF THE AMICUS CURIAE.[1]

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business member-

1. Pursuant to Rule 29, F.R.A.P., there have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus* brief.

ship in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[2]

Two questions of continuing importance to the Chamber and its members are raised here. (1) The first concerns the circumstances under which an employer properly may suspend bargaining with an incumbent union and insist upon an election to validate the claim of majority status. (2) The second major question is whether employer's counsel in interviewing employees in the course of trial preparation violates the Act by asking questions relevant to the credibility and reliability of the prospective employee witness. This latter question stems from the Board's ruling circumscribing counsel's questioning to only the central factual allegations made against the employer.

These questions are of partciular concern to the Chamber and its members since the Board's formulation of legal standards applicable to such matters exert a direct and adverse impact on

2. *E.g., N.L.R.B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *Connecticut Light and Power Company* v. *N.L.R.B.*, No. 72-1664 (Second Circuit); *Ottawa Silica Company, Inc.* v. *N.L.R.B.*, No. 72-1590 (Sixth Circuit); *Brisco Huff* v. *N. D. Cass Company of Alabama*, No. 71-2842 (Fifth Circuit); *Grinnell Corporation* v. *Hackett*, Nos. 72-1275, 76 (First Circuit); and *Mobil Oil Corp.* v. *N.L.R.B.*, Nos. 72-1415, 1538 (Seventh Circuit).

those members' rights under the National Labor Relations Act. Both of the foregoing questions relate to the proper interpretation and administration of important policies of the Act which will have wide-spread effects upon the management community. The question relating to the circumstances under which an employer may and may not properly suspend bargaining with an incumbent union critically affects the on-going bargaining relationships to which the employer-members of the Chamber are parties and it is important that the policies therein be clear and consonant with the Act. Further, the question concerning the proper scope of trial preparation by an employer's counsel impacts upon virtually every one of the Chamber's members who from time to time may be involved in proceedings before the National Labor Relations Board. The Chamber, by virtue of its continuing interest in the development of the law and policies under the National Labor Relations Act, is in a position to urge views upon this Court which neither party has argued.

STATEMENT OF THE CASE.

The present litigation arose from the action by Retired Persons Pharmacy (herein referred to as the "Employer") in withdrawing recognition from Metropolitan Guild of Pharmacists (herein referred to as the "Union") and refusing to bargain until the Union had established its majority status. On April 19, 1973, the Employer advised the Union that it doubted that a majority of the employees continued to support the Union as their bargaining representative. On the same day, the Employer petitioned the N.L.R.B. for an election to determine the question of majority status.[3] This action occurred well after the expiration of the Union's one year certification period, during which an employer must bargain without questioning majority status,[4] and during the period immediately prior to the expiration of the collective bargaining agreement between the parties. The relations between the parties had not been marred by unfair labor practices or hostility, but as acknowledged by the Union's counsel, the relationship had been "excellent" and had grown progressively better throughout the duration of the agreement (143a-144a).

The Board's Administrative Law Judge held that the withdrawal of bargaining violated Section 8(a)(1) and (5) of the

3. The Regional Director dismissed the Employer's petition because it was untimely filed under the Board's rules. Though the petition would have been timely if refiled after the collective bargaining agreement had expired on May 29, 1973 (*Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958)), the Union had by that date already filed its charge against the employer alleging that it had unlawfully refused to bargain (74a). Under the Board's practices an election petition will not be processed while there is pending a refusal to bargain charge. *Panda Terminals, Inc.*, 161 NLRB 1215 (1966).

4. *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

Act, because, as he found, the Employer had not met the Board's criteria for establishing grounds for a *bona fide* doubt of the Union's majority (77a-79a). Also, the Law Judge held that interviews with employees conducted by the Employer's counsel in preparation for trial constituted unlawful interrogation in violation of Section 8(a)(1) of the Act (79a-85a).

The Board, in a *pro forma* decision, affirmed the finding of the Administrative Law Judge on each of the foregoing matters (117a-118a).

These findings raise important questions concerning the correctness of the criteria used by the Board in determining the scope of an employer's legitimate interests both with regard to withdrawal of recognition from an incumbent union and counsel's preparation of a defense to alleged unlawful conduct under the Act. We show below that with respect to both issues the Board has applied overly strict and rigid criteria inconsistent with the scheme of the Act and estabilshed legal principles.

ARGUMENT.

I.

BY SEVERELY RESTRICTING AN EMPLOYER'S RIGHT TO TEST BY AN ELECTION THE MAJORITY STATUS OF AN INCUMBENT UNION, THE BOARD HAS DISREGARDED THE EXPRESS PROVISIONS AND POLICIES OF THE ACT.

A. Introduction: The Board's Standard Improperly Denies the Employer the Statutory Right to Obtain an Election When There Is a Reasonable Basis to Doubt the Union's Majority.

The conditions imposed by the Board here upon an employer's right to suspend bargaining and insist upon an election are contrary both to the scheme of the Act and its express provisions. It has long been recognized that, although a union ordinarily enjoys an irrebuttable presumption of majority status for one year after it has been certified through the Board's election processes, thereafter an employer may suspend bargaining and insist upon an election if there is a *bona fide* doubt of the union's majority. *E.g., Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). *Celanese Corporation of America*, 95 NLRB 664 (1951).

In applying this principle the Board has developed a doctrine which requires the employer, as a condition to the suspension of recognition, to show a *probable* loss of the union's majority. As demonstrated in the instant case, that doctrine bars the employer from insisting upon an election unless he shows that at least one half of the employees have repudiated the union in unequivocal terms.

This standard of the Board is contrary to the clearly correct view that "a reasonable basis in fact *to doubt* the incumbent

union's majority status"[5] (emphasis supplied) justifies the employer's suspension of bargaining pending an election. Under this correct view an election should be held when the employer receives *any reliable* information that a substantial number of his employees, though not necessarily one half, have indicated serious dissatisfaction with union representation, which need not necessarily amount to an unequivocal repudiation; thereby creating a reasonable basis in fact for a *doubt* of majority status.

As we show below (*infra* at pp. 10-12), such a criteria of reasonable basis for doubt is required by the Taft-Hartley Amendments to the Act which provide that the Board shall conduct an election upon a showing by any party, union, employee or employer, that "*reasonable cause*" exists for such election. In applying this standard of reasonable cause with respect to election petitions filed by either employees or unions, the Board requires only a showing of interest by 30 per cent of the employees affected. Therefore, it is readily apparent that the Board has departed from the reasonable cause standard, required by the Act, and imposed stricter limitations upon an employer's right to an election by requiring that at least 50 per cent of the employees unequivocally repudiate an incumbent union. In applying such a disparate standard to employers in these circumstances, the Board has reverted to the discarded policy of the Wagner Act of insulating incumbent unions from challenge. In doing so, the Board ignored the current statutory policies fostering employee self-determination and majoritarianism in collective bargaining.

Accordingly, we show more fully below, first, that the Board applied a standard which imposes improper conditions upon the employer's right to insist upon an election and, secondly, that such standard is contrary to the provisions and scheme of the statute.

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5. *Balley Case and Cooler, Inc. of Delaware* v. *N.L.R.B.*, 416 F. 2d 902, 904-905 (6th Cir., 1969), *cert. denied*, 399 U.S. 910 (1970). Also see cases cited at p. 9 *infra*.

B. The Board Has Used an Erroneous Standard Requiring the Employer to Show Probable Cause to Believe That the Union Has Lost Its Majority.

Under the test employed here by the Board and the Law Judge, an employer violates the Act by suspending bargaining with an incumbent union unless he has a "basis for believing that the union has lost its majority status." *U.S. Gypsum Co.*, 157 NLRB 652 (1966). Accord: *Gulf Machinery Co.*, 175 NLRB 410, 411-413 (1969). Demonstrably this test requires more than facts that create doubt or substantial uncertainty. An analysis of the Law Judge's decision here reveals that in applying the Board's standard he employed two criteria, both of which the employer was required to meet in order to justify his conduct. The first of these requires unequivocal repudiations of the union by employees and the second, that no less than one half of the bargaining unit employees voice such repudiations.

As to the first criterion, the Law Judge held that the employer did not show that a sufficient number of employees had repudiated the Union in unequivocal terms. The Law Judge characterized as "equivocal", statements of some employees because they were "not clear or firm enough indications that the employee did not want the Guild to represent him" (78 a); and ruled that such statements were entitled to no weight at all in judging the employer's *bona fide* doubt of majority. Among these statements by employees were remarks that they "didn't bother with the Guild" or had "no time for the Guild" or had "no use for the Guild" (78a-79a). Because they did not meet the criterion of unequivocal repudiation, the Law Judge and the Board found them insufficient.[6]

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6. In its brief, the Petitioner correctly argues that the statements of the 6 employees in question, being laymen's vernacular for disavowing the Union, were unequivocal and met the Board's standard. We fully support this position, but assuming *arguendo* such statements to be equivocal, they were sufficient to raise a *bona fide* doubt, under the liberal and correct standard employed by the courts.

Applying the second criterion, the Law Judge held that the employer had not shown such unequivocal repudiations by one half of the employees in the bargaining unit. Although 14 out of 28 employees in the bargaining unit, or one half, had expressed dissatisfaction with the Union, 6 employees were held to be insufficient as shown above. Though this left 8 employees whose repudiations were valid, the Law Judge held that number insufficient to raise a *bona fide* doubt. Thus, the Employer was held to a strict showing of probable cause to "believe that the Guild had lost its majority." (79a).

The Board's standard contrasts markedly with the better considered view of at least three courts of appeal. Under the latter view which comports with the language and scheme of the Act, an employer is justified in insisting upon an election, whenever there is "a reasonable basis in fact to doubt the incumbent union's majority status." (emphasis supplied) *Balley Case and Cooler, Inc. of Delaware* v. *N.L.R.B.*, 416 F. 2d 902, 904-905 (6th Cir., 1969), *cert. denied*, 399 U.S. 910 (1970); *Automated Business Systems* v. *N.L.R.B.*, No. 73-1831, 6th Cir., decided May 23, 1974, 86 LRRM 2659; *International Association of Machinists* v. *N.L.R.B.*, 416 F. 2d 809, 811-813 (D.C. Cir., 1969); *Terrell Machine Co.* v. *N.L.R.B.*, 427 F. 2d 1088, 1090 (4th Cir., 1970). The distinction between this test and the Board's test is that the first provides that doubts and uncertainties which are reasonable are to be resolved at the ballot box, whereas the Board's standard gives the benefit of such doubts to the incumbent union. The more liberal standard applied by the courts is supported by the Supreme Court's statement of the test in *Ray Brooks, Inc.* v. *N.L.R.B.*, 348 U.S. 96, 104 (1954). There it said:

> "[O]ne year after certification the employer can ask for an election or, if he has *fair doubts* about the union's continuing majority he may refuse to bargain further with it." (footnotes omitted) (emphasis supplied)

As we next show, the standard of reasonable basis to doubt of majority accords with the language of the Act as amended by Taft-Hartley and is consistent with the scheme of the statute. The Board's test, on the other hand, more severely restricts an employer's basis for obtaining an election than requests by employees or unions for elections, contrary to the express provisions of the Act, its policies and its overall design.

C. The Act Requires That an Employer Be Able to Obtain an Election Whenever There Is a Reasonable Doubt of the Incumbent Union's Majority Status.

1. The Taft-Hartley Amendments Specifically Accord an Employer the Right to an Election Here.

The standard permitting an employer to insist upon an election whenever there is a reasonable basis to doubt majority is required by the policy and language of the Act. The Board's more stringent rule is a throw back to the regime of the Wagner Act which protected an incumbent union from being challenged in an election initiated by an employer, and conflicts with the Taft-Hartley amendments.

Under the original Wagner Act and its policy of fostering unionism, the Board refused to entertain election petitions filed by employers or employees, thereby foreclosing them from ousting an incumbent through the election process. *Tobardy Mfg. Co.*, 51 NLRB 246 (1943); see, *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). However, in the Taft-Hartley Act of 1947 (61 Stat. 136), Congress amended the Act to guarantee the right of employees to refrain from collective bargaining and thereby gave new emphasis to the statutory policy of fostering employee self-determination. (Section 1 of the Act, 29 U.S.C. Sec. 151). To effectuate this policy Taft-Hartley expressly provided in Section 9(c)(1) (29 U.S.C. Sec. 159(c)(1))[7] that

7. See: Lewis, "Employee Petitions—New York and Federal —a Comparison" Proceeding of N.Y.U. 5th Annual Conference on Labor (1952) 249, 257.

employees and employers have standing to petition for an election, a right which only unions had under the Wagner Act.

As one means of assuring greater opportunity for employees to participate in elections, Congress in Section 9(c)(1) specifically required the Board to process election petitions whenever "it has *reasonable cause* to believe that a question of representation . . . exists." (emphasis added) Moreover, Section 9(c)(1) assured employers parity with unions and employees in obtaining elections by providing that "the same regulations and rules of decision shall apply irrespective of the identity of persons filing the petition . . .". These provisions make clear that employers have an equal role with the other interested parties in effectuating employee self-determination, and that such policy dictates that an election be available to an employer upon a showing of "reasonable cause".

Logically, this statutory standard of *"reasonable cause"* provides the basis for the rule recognized by the courts (*supra*, p. 9) that an employee has a right to insist upon an election whenever there is a *reasonable basis* in fact to doubt an incumbent union's majority status. For since the purpose of Taft-Hartley was to create greater opportunity for employees to express their preference with respect to representation, "reasonable cause" requires that a factually based reasonable doubt of majority should be resolved at the polls.

Moreover, the Board's election rules applied in other situations amplify the meaning of the "reasonable cause" standard, and establish that the Board's ruling requiring a showing that an incumbent union be repudiated by 50 per cent of the employees is contrary to this statutory standard. In virtually every situation other than an employer's challenge to an incumbent union, the Board views the "reasonable cause" standard to be met either by a showing of interest by only 30 per cent of the employees or by no percentage showing at all. Thus, the 30 per cent rule applies to unions seeking initial certification,

outside unions seeking to displace an incumbent and employees seeking to decertify a union or to rescind an incumbent's right to negotiate for a union security provision.[8] Also, the "reasonable cause" standard is deemed to be satisfied when two rival unions make conflicting claims for majority representation, in which case the Board holds that an election is the only suitable means of determining their representational status.[9]

These factors demonstrate that the Board has erred in formulating a more stringent standard than "reasonable doubt" for determining when an employer may obtain an election here.

Though the foregoing statutory standard of "reasonable cause" governs the filing of election petitions, the same standard is applicable to the situation in which an employer suspends bargaining with an incumbent union and insists upon an election. Since in both instances an employer seeks to test the union's majority the same standard of "reasonable basis in fact to doubt majority" should control in both instances. As the Board has observed, in withdrawing recognition from an incumbent,

> "[a]n employer thereby does nothing more than require the union to prove its majority in the most satisfactory way, by secret election conducted under Board auspices. The Supreme Court has recognized that an employer can validly raise a question as to a certified union's continued representative status by refusing to bargain with the union as well as by filing a representation petition with the Board [citing *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98-99 (1954)]."

Stoner Rubber Co., 123 NLRB 1440, 1444, (1959). Recognizing the parallel between the two situations, the Board holds that the same standard applies to both. *U.S. Gypsum Co.*, 157 NLRB 652 (1966).

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8. *Potomac Electric Power Co.*, 111 NLRB 553 (1955); *Colonial Hardwood Flooring Co.*, 76 NLRB 1039 (1948); Section 101.18, NLRB's Statement of Procedure; 29 U.S.C. Sec. 159(c)(1)(A).

9. *Mid-West Piping & Supply Co.*, 63 NLRB 1060 (1945); *Empire State Sugar Co.* v. *N.L.R.B.*, 401 F. 2d 559 (2nd Cir., 1968).

2. The Proper Balancing of Interests Require the Adoption of the Standard Based Upon Reasonable Doubt.

As we have shown above, the Taft-Hartley amendments require that an employer have the right to insist upon an election whenever there exists a reasonable basis in fact to doubt majority status. The same conclusion is compelled by an analysis of the proper balance to be struck between the legitimate interests of the parties affected. *Cf. N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311-312 (1965); *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Here, the fundamental legal interest of the employer stems from the fact that he has no obligation to bargain with a union not representing a majority of his employees. In fact, he subjects himself to liability under Section 8(a)(2) of the Act if he does so, even in a good faith belief that the union does represent such a majority. *International Ladies' Garment Workers' Union* v. *N.L.R.B.* (*Bernhard-Altman Texas Corp.*), 366 U.S. 731 (1961).

Apart from the question of potential legal liability, the employer has a legitimate business interest in the impact that dissatisfaction with a minority union may well have upon the morale of his employees. Morale is plainly a critical factor in the productivity of employees and has a direct effect upon the profitability of the enterprise. Because of such business impact, the court in *Sears, Roebuck and Co.* v. *N.L.R.B.*, 450 F. 2d 56, 62 (6th Cir., 1974), recognized that the employer's business interest in maintaining morale justified action to remedy dissatisfaction even though it impinged upon competing rights under Section 7 of the Act.

Both of these factors demonstrate the substantiality of the employer's interests in obtaining a secret ballot election whenever reasonable doubts of an incumbent union's majority status arise. Moreover, these interests are not satisfied by the Board's

standard which permits the employer an election only if there is a showing of probable loss of majority. That restriction leaves the employer in the dilemma of being required to bargain at the peril of violating Section 8(a)(2) and possibly of being saddled with a deteriorating morale problem at a time when there is reasonable doubt with respect to whether the union represents a majority.

At the same time, the employer has no feasible means of exercising self-help to extricate himself from the dilemma. He may not poll the employees to determine probable loss of majority, even if he complies with the stringent requirements of the Board's *Struksnes*[10] rule, for the the Board holds such polls unlawful unless the employer already possesses evidence of probable loss of majority. *Montgomery Ward & Co., Inc.*, 210 NLRB No. 120, (1974). Nor may the employer solicit the employees to file their own decertification petition (which need be supported only by a 30 per cent showing of interest) without running afoul Section 8(a)(1), and blocking the processing of the petition because of employer instigation.[11]

Moreover, a rule granting the employer the right to obtain an election upon reasonable cause does not significantly impair any employee interests protected by the Act. As already shown, the conduct of an election under these circumstances serves the employees' interest in self-determination. Moreover, there will be a minimal interruption, if any, in the employees' representation under an existing contract during the period required to conduct the election proceedings. For, the Board permits the filing of a petition between ninety (90) and sixty (60) days prior to the termination of an agreement so that ordinarily an

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10. *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The requirements of this rule governing interrogation of employees are quoted in full, *infra*, at footnote 20, page 23.

11. *Birmingham Publishing Co.*, 118 NLRB 1380 (1951); *Panda Terminal, Inc.*, 161 NLRB 1215 (1966).

election can be conducted before or soon after the agreement's expiration date.[12]

Also, there are both legal and practical deterrents to abuses by employers of their right to reasonable access to the election process. It is well established that if an employer induces the loss of the union's majority through unfair labor practices, he may not, in reliance thereon, invoke the defense of *bona fide* doubt of the union's majority and accordingly he will be ordered to bargain. *N.L.R.B.* v. *Superior Fireproof Door and Sash Co.*, 289 F. 2d 713, 719 (2nd Cir., 1961).

Normally, the employer also will be deterred from repeated insistence upon periodic elections, because to do so would antagonize the union and harden its attitude towards cooperation during the pendency of the intervening contracts. Moreover, an employer must in the first instance weigh carefully the advisability of seeking an election, since if he has miscalculated an election will only serve to arm the union with a fresh mandate which will strengthen its position at the bargaining table.

The foregoing considerations demonstrate that the Board's standard, restricting an employer's right to obtain an election upon reasonable cause is incorrect. Such standard trenches upon the valid interests of the employer without preserving in any significant way those interests of employees which are protected by the Act.

3. The Policy and Rationale of Gissel Require that the Board's Standard Be Rejected.

The Supreme Court in its *Gissel*[13] decision has laid down a new policy governing an employer's right to an election, which policy is consistent with the analysis made above (Section B 1 and 2, *supra*). The Board's standard unduly restricting the employer's right to an election is contrary to that policy.

12. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962).

13. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

In *Gissel* the Court announced that an employer's right to an election must be governed by the policy that "the Board's election and certification procedures under Section 9(c) of the Act . . . [constitute] the preferred route" for determining a union's majority status. 395 U.S. at 596. Further, the Court held that fictional and extraneous doctrines, such as the Board's traditional requirement that the employer act in good faith, should not bar the employer from an election. It stated "an employer's good faith doubt is largely irrelevant." 395 U.S. at 594. Abandonment of such extraneous and fictional consideration is required by the statute itself. As the Court said (395 U.S. at 599), "[Section 9(c) of the Act] was intended as the legislative history indicates, to allow [employers], after [being] asked to bargain, to test out their doubts as to a union's majority in a secret election . . .".

The Board's requirement that probable loss of an incumbent union's majority be shown before an election may be held, also is based upon a fictional doctrine and is extraneous. Consistently the Board has justified the standard on the grounds that an incumbent union continues to enjoy a *presumption* of majority status after the certification year and therefore that strong evidence is required to rebut the presumption. See, *e.g.*, *The Celanese Corporation*, 95 NLRB 664 (1951); *Stoner Rubber Company, Inc.*, 123 NLRB 1440 (1959). Giving effect to a presumption of majority is a fiction when a substantial number of employees, though perhaps less than 50 percent, express strong dissatisfaction with their representative. The same is true in any number of other circumstances in which there is a reasonable factual basis to doubt a union's majority. Nevertheless, the Board's fictional presumption bars the employer from obtaining an election.

Moreover, the Board's test is extraneous because it imposes requirements not contemplated by the statutory standard of "reasonable cause" under Section 9(c). Thus, the requirements of the Board's test that a showing of probable loss of majority,

and that 50 percent of the employees recant, and that such recantation constitutes an unequivocal repudiation of the Union, all operate to foreclose many circumstances in which an election would resolve non-frivolous doubts and for which there was reasonable cause for an election. As the Court in *Gissel* has made clear, fictional and extraneous doctrines have no place in determining when an employer is entitled to test out such doubts in an election.

The rationale of the Court's *Gissel* policy very simply is the one already stated herein: that the intent of Section 9(c) of the Act is to promote self-determination among employees. As the Fifth Circuit stated in construing *Gissel*:

> "*Gissel* teaches us that . . . all concerned must be particularly careful lest the principles of majoritarianism in union representation be unnecessarily frustrated by the cavalier use of bargaining orders."

N.L.R.B. v. *American Cable Systems, Inc. (American Cable II)*, 427 F. 2d 446, 449 (5th Cir., 1970), *cert. den.* 400 U.S. 957. Accord: *N.L.R.B.* v. *Gibson Products Co.*, No. 73-1383, decided May 31, 1974, 86 LRRM 2636, 2637.

The same rationale requires here that the right to test the union's majority status in a secret ballot election not be subordinated in a cavalier fashion to a presumption of continued majority enforced by a bargaining order. The Board's standard therefore should be rejected.

II.

THE BOARD'S RULE WHICH PROHIBITS AN EMPLOYER'S COUNSEL FROM QUESTIONING EMPLOYEES ON MATTERS GERMANE TO CREDIBILITY AND BACKGROUND MATERIAL IS ERRONEOUS.

A. The Board Applied an Improper Standard.

In finding a violation of Section 8(a)(1) of the Act here, the Board has imposed unrealistically narrow standards upon the scope of counsel's interviews with employees in preparation for trial. Specifically it condemned those questions germane to the credibility of the witness and background of unfair labor practices because they touched upon the employees' subjective state of mind and the incidental activities of the Union (83a-84a). In support of this holding, the Board relied upon its *per se* rule that counsel's questions exceed the legitimate purpose of trial preparation whenever they "pry . . . into other union matters [or] elicit . . . information concerning an employee's state of mind." *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied on other grounds, 344 F. 2d 617 (8th Cir., 1965).

The Board's decision constitutes a serious departure from well established precedent. The Supreme Court has held that not all conduct affecting employees' statutory rights is unlawful. Where "the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adopted to achieve legitimate business ends or to deal with business exigencies . . ." the employer's conduct is *prima facie* lawful. *N.L.R.B.* v. *Brown*, 380 U.S. 278, 287-288 (1965). It is requisite to proving a violation that "an affirmative showing of improper motivation . . . be made." *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). Accord: *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311-312 (1965); *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

The only exception to this principle of law is with respect to employer conduct which "is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive . . . [because] some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent'." *Great Dane, supra,* 388 U.S. at 33.[14] As we show below, this exception is inapplicable to the Employer's conduct here.

The foregoing analysis provides the "standards relevant to evaluating the finding of unfair labor practice under Section 8(a)(1)."[15] Indeed, the Supreme Court in *Fleetwood Trailer Co.*, "applied [the *Great Dane*] analysis to Section 8(a)(1) violations as well as unfair labor practices under Section 8(a)(3)." *Lane* v. *N.L.R.B.*, 418 F. 2d 1208, 1211 (D.C. Cir., 1969). Such analysis also governs the balancing of the interests here in determining the propriety of the Employer's counsel interviews under Section 8(a)(1).

B. The Legitimate Interests of the Employer in Preparing a Defense Bars the Finding of Section 8(a)(1) Violation.

It has been judicially acknowledged that employers have a legitimate interest in preparing an adequate defense to unfair labor practice charges, and that such interest justifies the ques-

14. The examples of such "inherently destructive" conduct cited by the Court are those referred to in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 288 (1965) (super-seniority to employees who worked during a strike); *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311-312 (1965) (discharging only a union leader among numerous employees who have broken shop rules); and *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963).

15. *N.L.R.B.* v. *Hudson Transit Lines, Inc.*, 429 F. 2d 1223, at 1229 (3rd Cir., 1970). See also *Lane* v. *N.L.R.B.*, 418 F. 2d 1208 (D.C. Cir., 1969); and *N.L.R.B.* v. *Gotham Industries*, 406 F. 2d 1306 (1st Cir., 1969). Cf. *Laclede Gas Co.* v. N.L.R.B., 421 F. 2d 1228 (8th Cir., 1970).

tioning by counsel of employees concerning union matters. *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732 (D.C. Cir., 1950). Thus no violation of the Act occurs when counsel's questions are "*relevant* to the charge of unfair labor practices and of sufficient *probative value* to justify the risk of intimidation which interrogation as to union matters necessarily entails." *Joy Silk Mills, supra,* 185 F. 2d at 743. Thus, the legitimacy of the employer's interest for purposes of the analysis under the *Brown* and *American Ship* standard is to be judged by the *relevancy* and *probative value* of the questioning.

The Employer met that test here. The purpose of the interviews by counsel was to investigate and prepare one of the employer's defenses to the charge of refusal to bargain; that the Union had lost its majority in fact. This defense, which is an alternative to that of *bona fide* doubt concerning the union's majority, was invoked here, and is recognized to be valid at law.[16]

In preparing this defense, it was relevant for counsel to inquire whether the employees supported the union on the date the Employer had withdrawn recognition. In addition to this central inquiry, counsel also asked a number of detailed background questions to verify the extent to which the employee was either actively or inactively in support of the Union. Such questions included whether the employee paid dues, had ever ceased to pay dues, attended meetings frequently or at all, and was familiar with the contract and the Union's constitution. Also, there were several control questions to which the answers were apparent and which were designed to test the candor and truthfulness of the employee's other answers: these included questions about the names of the officers, and shop stewards of the Union. Also counsel asked a few questions concerning the employee's

16. *Terrell Machine Co.* v. *N.L.R.B.*, 427 F. 2d 1088, 1090 (4th Cir., 1970); *The Celanese Corporation*, 95 NLRB 664 (1951); *N.L.R.B.* v. *Dayton Motels, Inc.*, 474 F. 2d 328, 331 (6th Cir., 1973).

subjective attitude toward the Union, such as whether he was satisfied with the Union's handling of grievances. These latter questions were designed not only to gauge the degree of support for the Union, but the individual employee's bias for or against the Union which might color his testimony if he were called as a witness at the hearing by either party (912-93a).

The Law Judge held such questions outside the purview of proper preparation for trial, because in his view "the only relevant inquiry in interviews designed to determine whether [the Union] continued to have majority support in fact was 'do you wish the [Union] to represent you for purposes of collective bargaining'." (83a).

However, such a narrow view of trial counsel's function in preparing a defense does not permit adequate legal representation of a party to an administrative proceeding. Counsel must be allowed to inquire not only as to the basic facts in dispute, but also as to those contextual matters which go to credibility of the witness. Thus, the underlying factual details which indicate the accuracy of broad and conclusionary answers by employees who are potential witnesses, are both relevant and probative. Also, it is of critical importance that counsel be allowed reasonable latitude to explore the candor of the potential witness and his powers of perception and recollection through the use of control questions. Those questions which touch upon the employee's subjective attitudes toward the Union are relevant and probative of possible bias and are necessary to provide counsel with a basis either for deciding whether the employee should be called as the Employer's witness, or for deciding how to cross-examine should the employee be called as a witness by the opposing party. In short, all of these questions are essential to counsel's function, which is not merely to gather raw data, but also to investigate those matters which will afford him a basis for making judgments concerning the quality of the evidence.

In balancing the interests involved herein, it is clear that the scope of the questioning was not inherently destructive of the employee's protected rights, but had only slight impact thereon. This court has held that interrogation of employees unaccompanied by threats is not inherently coercive. *Bourne* v. *N.L.R.B.*, 332 F. 2d 47 (2nd Cir., 1964). Under the rule of that decision, to be coercive, there must be present such factors as a background of hostility toward the union, an unlawful purpose for obtaining the information sought, a high ranking inquisitor, an unnaturally formal setting for the interrogation and untruthful response by the employees. None of these factors were present here, and we support the Employer's position that *Bourne* requires that the Board's finding of unlawful interrogation be set aside.[17]

The Board failed to show the prerequisites to a violation of Section 8(a)(1) as required by *Brown* and *American Ship Building*.[18] There was no proof that the conduct here was unlawfully motivated, or that it had any but minimal impact upon the employees' rights under the Act.

In holding here, under the *Johnnie's Poultry* rule, that the scope of counsel's questions may not extend to background material concerning union matters, or to the subjective attitudes of the employees (unless through secret polling) the Board fundamentally misconceives the appropriate standard of relevancy and probativeness. The rationale supporting that standard is to accommodate the rights of both the employer and employees. By prohibiting counsel's inquiries into attitudes and union matters, the Board emasculates those legitimate interests of the employer

17. Moreover, even if some counsel's questions strayed beyond the usual guidelines of relevancy and probativeness, absent a coercive design the interrogation is not unlawful. For it has been held that interrogation which is without any useful purpose is not for that reason alone a violation of the Act. *S.H. Kress & Company* v. *N.L.R.B.*, 317 F. 2d 225 (9th Cir., 1963).

18. *Supra*, at pp. 18-19.

without any showing of coerciveness which would infringe upon the employee's interests. For these reasons, the balance must be struck so as to permit the kind of investigatory interviews by counsel shown here and the Board's findings must be set aside.

C. The Board's Treatment of Counsel's Interviews as Unlawful Polling Was Error.

Further, the Law Judge erred in characterizing the interviews here as a polling of employees, and in concluding that the requirements by the Board's *Struksnes*[19] rule governing polling were applicable. Among those requirements is one that can never be met by counsel in preparing his client's defense, but was the basis upon which the Law Judge found the conduct here to be unlawful. That requirement is that the inquiry concerning the employees' desire for union representation must be conducted by secret ballot.[20]

Even if this Court's *Bourne* decision did not invalidate the *Struksnes* rule, *Struksnes* would nevertheless be inapplicable to interviews by counsel since the requirement of secrecy is inconsistent with the purpose of permitting counsel to interview employees to prepare his client's defense. Without knowing the identity of the employee whose views are expressed, counsel cannot call him as a witness or prepare his cross-examination. It is clear that questioning by counsel should be governed by

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19. *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

20. In full the *Struksnes* safeguards are as follows (*supra*, 165 NLRB at 1063):

> "Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere."

the legal standard requiring only "relevance" and "probative value" because such standard represents the appropriate balance struck between the divergent interests of the employer and the employees.

CONCLUSION.

For all of the foregoing reasons, the *amicus* urges that the Court grant the Employer's petition to set aside the Order of the Board.

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No. 74-1651

STATE OF ILLINOIS, } ss. H. Langbaum ..... being first duly
COUNTY OF COOK. }

sworn, deposes and says that he served ...two... copies of the ..Brief.....

.....

in the above entitled cause, as per statute herein made and provided, on

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this .....11th. day of .....December....., A. D. 19..74

H. Langbaum

Subscribed and sworn to before me this 11th
day of .....December....., A. D. 19.74.

Leonard S. Levinson
Notary Public.

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